IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION.

CRIMINAL REVISION APPLICATION No. 265 of 2007

Ashok Chaturvedi ..Applicant.

Vs.

State of Maharashtra and Ors. ..Respondents.

Mr A.H. Ponda, i/b Prashant Parsurampuria, Advocates for the Applicant.

Ms M.H. Mhatre, A.P.P for the Respondent No.1-State

Respondent No.2 present in person.

CORAM: V.C. DAGA, J.

DATED: 03.10.2007

P.C.:-

1. This case, after having heard learned counsel for the applicant, learned A.P.P. for the Respondent No.1-State and the respondent No.2 appearing in person, was dismissed for the reasons to be recorded. Accordingly reasons are being recorded in support of the order based on the factual matrix appearing hereinafter.

INTRODUCTION:-

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2. This revision petition is directed against the order, dated 9.4.2007 passed in Misc. Criminal Application No. 68 of 2006, filed in Cri. Appeal No. 437 of 2005, rejecting application under Section 391 of the Code of Criminal Procedure ("the Cr.P.C.") seeking permission to adduce additional evidence in the appeal, requesting to summon Officers of the Canara Bank, Canaught Circle Branch, New Delhi, for examination and production of certain documents mentioned in the said application.

THE FACTUAL MATRIX:-

3. The factual matrix reveal that the applicant came to be convicted for the offence punishable under Section 138 of the Negotiable Instruments Act, 1881 ("the N.I.Act") vide order dated 19.8.2005 passed in Criminal Case No. 100/SS/2005 by the learned Metropolitan Magistrate, 44th Court, Andheri, Mumbai.

4. Being aggrieved by the order of conviction, the applicant preferred appeal before the Court of Sessions, Greater Bombay.

5. In the aforesaid appeal, an application to adduce additional evidence, as stated hereinabove came to be moved unsuccessful. The foundation of the application to adduce additional evidence was that though during the deposition of P.W.No.2, the some of the documents i.e. fax copies of the letters dated 17.4.1998, 4.4.1998, 13.1.1999 and the Statement of Account of M/s. Flex India Ltd. and certificate of balance dated 30-5-2005, showing the balance in the account of the accused on 13.4.1998, were taken on record and exhibited, but the same were not considered properly by the Trial Court, while pronouncing the judgment and order. It was felt necessary by the applicant to move application under Section 391 of the Cr.P.C. In other words, permission to lead additional evidence was sought, with a request to summon the concerned Officer from the Canara Bank, New Delhi.

6. In support of the above prayer, it was submitted that the statement of the account produced by P.W.no.1 was not considered by the learned Magistrate, while delivering judgment; since it did not bear certificate under the Bankers Books of Evidence Act. It was, thus, sought to be urged that the additional

evidence would be necessary to rebut presumption raised against the accused.

SUBMISSIONS:-

7. Mr Ponda, learned counsel appearing on behalf of the applicant, after narrating facts of the case, urged that in the interest of justice opportunity should be granted to the applicant-accused to lead evidence. He placed reliance on the judgments of the Apex Court in the case of **Rambhau and another Vs. State of Maharashtra, 2001 CRI.L.J. 2343, Anil Sharma and Others Vs. State of Jharkhand, 2004 Supreme Court Cases (Cri) 1706, Zahira Habibulla H. Sheikh and Another Vs. State of Gujarat and others, 2004 Supreme Court Cases (Cri) 999 and also relied upon one unreported judgment of learned Single Judge of this Court in Criminal Revision Application No. 4056 of 2006 (Munugala Dayakar Aliappa vs. The State of Maharashtra).**

8. The submissions advanced by Mr Ponda were strongly opposed by the respondent No.2 appearing in person and urged that the application moved under Section 391 of the Cr.P.C., itself, is not maintainable. That the circumstances warranting exercise of

powers given to the Appellate Court under Section 391 of the Cr.P.C. are not at all available in the instant case.

9. It is further submitted that prosecution under Section 138 of the N.I.Act is supposed to be decided with expeditious despatch. The delaying tactics adopted by the applicant, if allowed to take place, then the very purpose of the legislation would be defeated. It is further urged that perusal of Section 391 of the Cr.P.C. would suggest that the said Section is not available to fill up the lacuna but to sub-serve the ends of justice. It is, thus, urged that the fair opportunity was available to the applicant-accused, who had huge financial resources at his command which resulted into engagement of the best legal brain in the trial Court. As such, one cannot presume that no fair opportunity was given to the applicant. It is further urged that the basis of application is the adverse finding recorded by the Trial Court while appreciating evidence that by itself cannot be a ground to invoke Section 391 of the Cr.P.C.

10. While opposing prayer for adducing

additional evidence, the complainant - respondent no.2 herein would contend that the omissions and contradictions, despite ample opportunity, if not brought on record in the trial, the said defect cannot be allowed to be cured or rectified in the appeal by claiming right to adduce additional evidence under Section 391 of the Cr.P.C.

11. In the opposition, it is urged that the Canara Bank, Delhi Branch, has nothing to do with the question pending in the appeal. The respondent No.2-complainant would urged that the alleged application is mala fide and is an attempt to protract litigation and to avoid punishment. In support of this submission the checkered history of the litigation is pressed into service to demonstrate that at every stage the accused has been taking chances before this Court, as well as before the Apex Court. In support of this submission, it was pointed out that initially the applicant-accused had filed objection for recalling process issued by the learned Magistrate which was rejected. Then, he moved the Sessions Court in revision, wherein, he failed. He, thereafter, unsuccessfully, approached this Court and, thereafter, the

Apex Court.

12. It is further submitted at the cost of repetition, that the Trial was pending in the Trial Court, almost for a period of seven years since the date of commission of offence is 22.5.1998 and complainant-respondent No.2 who is a Senior Citizen is being dragged in litigation from one court to another.

CONSIDERATION:-

13. With the aforesaid strongly canvassed rival contentions, I am called upon to decide the legality and validity of the impugned order passed by the learned Sessions Court in exercise of revisional jurisdiction of this Court.

14. The contours of revisional jurisdiction of this Court are well established. In this behalf, readily available judgment of the Apex Court can conveniently be referred to in the case of **Amarchand Agarwal vs. Shanti Bose and Anr, A.I.R. 1973 S.C. 799**). The jurisdiction of the High Court under Section 391 of the Cr.P.C. is to be exercised only in

exceptional cases, when there is glaring defect in the procedure or there is a manifest error on point of law and secondly, there has been a flagrant miscarriage of justice.

15. With the aforesaid restrictions put on power of this Court, let me turn to the basic foundation on which the application to adduce evidence is based. In the case on hand, the accused is seeking to adduce additional evidence, that too, at the appellate stage, when ample reasonable opportunity was available in the trial Court and the same was availed of without any complaint or grievance. The foundation of the application, as could be seen, is that the documents which were exhibited in the evidence of the accused, were not considered properly by trial Court while pronouncing judgment and order; and as such it became necessary for the applicant to invoke powers of the Court under Section 391 of the Cr.P.C. One has to put a question unto himself, could it be a ground to invoke the powers of Section 391 of the Cr.P.C. The answer has to be in negative.

16. The Apex Court in the case of **Rambhau Vs. State of Maharashtra (supra)** has clearly laid

down that Section 391 of the Code is not meant to fill up the lacuna but to sub-serve the ends of justice. The Apex Court on analysis equated Section 391 of the Cr.P.C. with that of Order 41 Rule 27 of the Civil Procedure Code. Going by this proposition of Law laid down by the Apex Court, it is well settled that application for additional evidence under Order 41 Rule 27 of the C.P.Code was required to be considered by the Appellate Court along with the main appeal. An evidence can be adduced when Court from whose decree an appeal is preferred has refused to admit the evidence, which ought to have been admitted or party seeking additional evidence establishes that notwithstanding exercise of due diligence such evidence was not within their knowledge or could not have after due diligence been produced by them at the time when decree appealed was passed or required to be produced or any witness to be examined to enable it to pronounce judgment. If this test is applied to the facts of the present case, no fault can be found with the view taken by the Court below while rejecting application under Section 391 of the Code. The analogy of Order 41 Rule 27 of C.P.Code is imported, based on the judgment of the Apex Court in the case of

Rambhau Vs. State of Maharashtra (supra)

(Para 4).

17. In the very same judgment of **Rambhau,** (cited supra) one more judgment of the Apex Court in the case of **Rajeshwar Prasad Misra vs. State of West Bengal, A.I.R. 1965 S.C. 1887;** is referred to; wherein, in no uncertain terms the Apex Court observed that the order must not ordinarily be made if the prosecution has had a fair opportunity and has not availed of it. Considered on the touchstone of Law laid down in this judgment, needless to mention that the accused had fair opportunity which he availed. He had exercised his right to cross-examine witnesses of the complainant as well as led his evidence. Thus, by no stretch of imagination, it could be said that no opportunity was available of the accused-applicant.

18. The documents, sought to be relied upon to adduce by way of additional evidence, are already on record. In the belief of the accused, they were proved in accordance with provisions of the Evidence Act. Now, in order to again prove the said documents, opportunity to lead additional evidence is being sought

which, in my opinion, is not available to the accused via route of Section 391 of the Cr.P.C. No attempt to fill up the lacuna by this method can be allowed. Though the Appellate Court has power to take additional evidence in a suitable case yet the discretion can not be exercised to fill up gaps or lacunas either in the case of prosecution or defence.

19. In the totality of the facts and circumstances of the case, on the back drop of the law laid down by the Apex Court, no fault can be found with the view taken by the Courts below while rejecting application refusing to grant permission to adduce additional evidence. The view taken is a well considered view.

20. This Court not being a Court of appeal cannot substitute its own view in exercise of revisional jurisdiction. Revisional jurisdiction is not only limited in scope but also it is discretionary. The Court interferes in the revisional jurisdiction only in exceptional cases of flagrant miscarriage of justice as held by the Apex Court in the case of **State of Rajasthan v. Gurucharandas**

Chaddha, AIR 1979 SC 1895. The case on hand does not fall in the category. Thus, this revision petition is liable to be dismissed in limine.

21. However, it is made clear that this order shall not come in the way of the Appellate Court, if the oral and documentary evidence alleged on record found to be insufficient for pronouncement of effective judgment by the Appellate Court. The discretion of the Appellate Court in this behalf is left open.

22. In the above view of the matter, no case is made out to interfere with the impugned order.

23. In the result, the revision application has no merit. Same is accordingly dismissed with no order as to costs.

(V.C. DAGA,J.)